can still institute wardship proceedings. The application is dismissed with costs.

Application dismissed.

Solicitors: *Mahalingam & Co.; D. P. Xavier & Co.*

SEBASTIAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Winslow J.) April 7, 1970]

[Singapore — Magistrate's Appeal No. 206 of 1969]

Criminal Law and Procedure — Witness — Refreshing memory from previous statement to police — Witness an accomplice — Evidence of witness not properly evaluated — Criminal Procedure Code (Cap. 132), s. 121.

Penal Code, s. 363 — Kidnapping — Charge of.

Evidence — Witness — Accomplice — Witness refreshing memory from previous statement to police — Evidence of witness not properly evaluated.

The appellant had been convicted on a charge of kidnapping. The principal evidence against him was that of an accomplice who had been convicted and sentenced for the same offence. It appeared that this witness had his memory refreshed from his statement to the police a few days before he gave evidence. The only evidence connecting the appellant was the evidence by the accomplice that he had made a telephone call to the school where the kidnapped boy was studying.

Held, allowing the appeal: in this case the court was not satisfied that the district judge had applied the correct test in evaluating the evidence. One was not sure whether the accomplice was giving evidence of what he had previously said or whether he was giving evidence of what he actually recollected. The evidence of the accomplice was far from satisfactory and the appellant should not have been called on to enter upon his defence.

Cases referred to:-

(1) *Lau Pak Ngam* v. *The Queen* [1966] H.K.L.R. 246; [1966] Crim. L.R. 443.

(2) *Kanbi Vaghji Savji* v. *State of Gujarat* [1968] Crim. L.J. 54.

MAGISTRATE'S CRIMINAL APPEAL.

Dato' David Marshall for the appellant.

Chia Quee Khee (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Winslow J.: The appellant was charged in the fourth Criminal District Court on 19th August, 1969 as follows: —

"You, Sebastian s/o Anthony Samy are charged that you, on or about the 24th day of January, 1969, at about 11.00 a.m. at the Nanyang Kindergarten, King's Road, Singapore, did kidnap one Leonard Thean See Yin, aged four years, a male minor under fourteen years of age, from the lawful guardianship of Dr. Thean Lip Hing, the father of the said minor, without the consent of such guardian, and you have thereby committed an offence punishable under section 363 of the Penal Code, Cap. 119".

Mr. David Marshall, counsel for the appellant, based his argument for quashing the appellant's conviction, first, on the ground that that court lacked jurisdiction to try this offence in the absence of a prior application by the Public Prosecutor and the consent of the appellant and, secondly, on the ground that the charge was defective in that particulars of the manner of the alleged kidnapping were not set out therein. He, however, mainly relied on two other grounds viz., that, as the principal witness for the prosecution was an accomplice who had already been convicted and sentenced to imprisonment for the same offence, the district judge had failed to recognise that this accomplice, in so far as he implicated the appellant had had his memory refreshed from his statement to the police a few days before he gave evidence, and that finally, the appeal should be allowed on the merits alone, particularly as some of the acts of the appellant deposed to by this accomplice were equally consistent with the appellant's innocence.

I accordingly propose to examine these latter submissions first in order to determine whether they are well-founded, pausing however to observe that the charge preferred against the appellant is defective in another respect, *viz.*, in that it does not state that the offence in question was committed by the appellant together with the accomplice with a common intention which was exactly what the prosecution set out to try and prove.

The learned deputy public prosecutor on the authority of *Lau Pak Ngam* v. *The Queen*[1] submitted that there was no rule that a witness should not refresh his memory from his former statement to the police. That case decided further, however, that anything in the nature of coaching would be reprehensible. Mr. Marshall on the other hand referred to an Indian case (*Kanbi Vaghji Savji* v. *State of Gujarat*[2]) which held that the value to be attached to the evidence of such a witness would depend on the circumstances of the particular case, since there was a likelihood that the witness would depose to what was contained in his previous statement rather than to what he actually recollected about what he had previously said. I would add, with respect, that another danger is, as adverted to in the Hong Kong case cited earlier, that a witness, who has refreshed his memory from his previous statement, might feel obliged to adhere to his previous statement even if he no longer believed it to be true. I might observe, however, that the Indian authorities cited by Mr. Marshall are based on section 162 of the Indian Criminal Procedure Code which differs from our section 121.

In the current appeal it was all the more important that the district judge should have scrutinised the evidence of P.W.9, Lee Kee Fatt, with even greater care than usual because, not only had he had his memory refreshed from his previous statement, parts of which "may have been" read out to him over and over again (according to the officer conducting the investigation), but he was also clearly an accomplice and the principal witness on whom the prosecution rested all their hopes for a conviction of the appellant.

He had had his memory refreshed in the manner I have just referred to. He was also a witness who, in the course of his evidence, tended to minimise the extent of the appellant's participation in the offence by stating that on the day of the kidnapping he did

not tell the appellant that he was going to execute the plan of which he had informed the appellant two or three weeks earlier. On the earlier occasion, according to him, the appellant merely smiled and gave no answer when the accomplice told him about his plan. On the actual day of the kidnapping the accomplice picked up the appellant in a car which he, the accomplice, had borrowed and drove him to Nanyang Kindergarten where Dr. Thean Lip Hing's son was studying. The appellant is then alleged to have asked the accomplice "what was it all about" and was told to keep quiet and just to follow him. The accomplice said that he then drove the appellant to a telephone booth and asked him to telephone the school and ask for Dr. Thean's son. According to the accomplice, the appellant did so. How the accomplice knew this the court was not told because he did not give any evidence of either having heard the appellant telephoning the school or having been told by the appellant that he had done so. After that, according to the accomplice, he drove the appellant and dropped him off at the junction of Empress Road and Farrer Road where he was asked to wait. . The accomplice then proceeded to the school and collected the child. He then returned to collect the appellant and then drove along Tyersall Road where the car met with an accident. After that they returned the boy to the father's house leaving him at the door.

From this, it would appear that the part played by the appellant in the affair was equally consistent with his innocence or non-involvement in the actual kidnapping except for one damning piece of evidence relating to the telephone call alleged to have been made by him to the school which, if accepted, was at most evidence of abetment of the offence at that stage. There is no corroboration at all of this vital piece of evidence.

The Principal of the school gave details of the telephone call which was conducted in English. According to this witness, the caller identified himself as Dr. Thean Lip Hing and said that his wife had had an accident and that she wanted to see her child who was then attending the school. The caller said he wanted to take the boy back and the Principal replied that he should have his own people to come and take the child away and the caller then replied "In that case, I will send my nephew in a car". The Principal then sat on a bench near the door to await the arrival of the nephew. It is clear from all the evidence that it was the accomplice who took the child away and was allowed to do so without any suspicion on the part of the staff and without any attempt on their part to test the *bona fides* of the accomplice.

In view of the evidence of the Principal regarding the telephone call and the nature of the discussion which he had with the caller who identified himself as Dr. Thean Lip Hing, it was essential that this vital aspect of the evidence against the appellant should have been weighed with the greatest possible care as against the rest of the evidence given by the accomplice.

It should also be borne in mind that the appellant is an Indian who was then 19 years old. One would have thought that it would not have been easy for an Indian aged 19 to delude the Chinese Principal of a school like Nanyang Kindergarten into the belief that the telephone caller was a Chinese doctor by the name of Thean Lip Hing even though both parties conducted their conversation in English unless the appellant can be said to be a consummate actor.

The prosecution also relied on a few letters sent by the appellant to the accomplice in prison before the trial in which the appellant is described by the district judge as having implored the accomplice to give evidence absolving him from any blame. The district judge however did not deal with the exact import of these letters in reaching his findings at the conclusion of the prosecution case. It should be remembered that in these letters the appellant also implored the accomplice to turn over a new leaf. Another letter written, not by the appellant, but, by another friend of the accomplice also contains an exhortation to the accomplice to turn over a new leaf "because crime does not pay". That letter was written in May 1969 after that friend had consulted the appellant and ends with the following postscript marked "imp. David does not know anything. I called him and he just follow me blindly".

In view of the revelation by the investigating officer that the accomplice had had his memory refreshed three days before the trial and in view of the tone of the letters written to the accomplice in prison it was important for the district judge at the close of the prosecution case to have stated what view he took of the letters at that stage and what view he took of the reliability of the accomplice as a witness who had had his memory refreshed in the manner I have earlier described. This he did not do.

To summarise, first, the accomplice had not told the appellant about the execution of the plan on the day he picked him up;

Secondly, when the accomplice drove him past the school and pointed out to him that that was where Dr. Thean's son was studying, the appellant asked him what it was all about and the accomplice told him to keep quiet and follow him;

Thirdly, the accomplice then drove him to a telephone booth and asked him to telephone the school and ask for Dr. Thean's son.

It seems to me that the district judge should have asked himself at that stage, whether, in view of what the accomplice said about the appellant's ignorance in relation to the first two matters I have mentioned, he could place much reliance on the evidence of the accomplice regarding the making of the telephone call by the appellant. In short, was it proved beyond a reasonable doubt at this stage that the appellant entered the telephone booth and telephoned the school for Dr. Thean's son having regard to the fact that he knew nothing about the execution of the plan initially on that day and wanted to know what it was all about when they reached the school and was told to keep quiet.

The district judge should also have asked himself the further question as to what effect these letters and the refreshment of his memory from his statement to the police had on the truthfulness and reliability of the accomplice and on the accuracy of his recollection of the incidents which actually occurred on the day of the kidnapping.

Not one question seems to have been asked of the accomplice relating to what effect these letters had on him or what he thought he was being asked to do.

The whole case depended on the slender thread of evidence relating to the telephone call which, as I have said, merely tended to prove abetment of kidnapping. But for this tenuous evidence there was nothing in the evidence of the accomplice to implicate the appellant in any way. If the prosecution relied on common intention on the part of both the appellant and the accomplice to kidnap the boy it was incumbent on them to allege and prove this common intention by showing that it existed at least at the time the accomplice picked up the appellant in his car that morning and that it continued right up to the time the car met with the accident after the boy had been taken from the school by the accomplice. The mere presence of the appellant in the car *after* the boy had been kidnapped from the school by the accomplice was not a circumstance which, standing alone, amounted to even abetment of the offence and was accordingly not corroboration of the substantive offence of kidnapping as the district judge held.

On the one hand, the prosecution contention was that by his letters to the accomplice in prison the appellant was practically prevailing on him to give false evidence in order to exonerate him. The letters, however, are couched in language which does not necessarily drive one to that conclusion alone. They could equally well be regarded as exhortations to speak the truth though one may strongly suspect that, reading between the lines, something more was expected of the accomplice. They are not self-implicating statements or confessions *simpliciter.*

As I have said, one does not know what effect these letters had on the mind of the accomplice when he came to give evidence. He was not asked anything about this.

On the other hand, it is clear from A.S.P. Lim Boh Tan's evidence that the accomplice had had the statement made by him to the police read over to him, and parts of it probably several times. Having regard to the principles which emerge from the Hong Kong and Indian cases cited earlier, one cannot be sure whether the accomplice was giving evidence of what he had previously said or whether he was giving evidence of what he actually recollected. One cannot also be sure what effect the appellant's letters had on his recollection or veracity. The evidence of the accomplice was, to say the least, far from satisfactory.

The district judge did not consider these matters and I am not satisfied that he applied the correct tests in evaluating his evidence. The appellant, in my judgment, should not have been called on to enter upon his defence.

In view of this, it seems unnecessary for me to express any firm opinion on the ground relating to lack of jurisdiction.

The appeal is allowed, the conviction quashed and the sentence of 3 years' imprisonment set aside.

Appeal allowed.

Solicitors: *David Marshall.*

BP MALAYSIA SDN. BHD. v. LOW NAM HUI CO. LTD.

[O.C.J. (Abdul Hamid J.) April 13, 1970]

[Kuala Lumpur — Civil Suit No. 1842 of 1969]

Practice and Procedure — Particulars — Application by letter for further and better particulars — Whether such application prevents time for delivery of defence from running — R.S.C. 1957 O.19 r.7A — Whether proper case to exercise discretion.

Where on an application by letter for further and better particulars under R.S.C. O.19 r.7A, the application is refused, and no application is made for a judge's order for particulars and no defence is filed within the time limited for delivery of the defence, any judgment obtained in default of the defence, unless the contrary is shown, must be deemed to be regularly obtained.

Cases referred to:-

(1) *Soona Sanmugam* v. *Wee Teow Beng & Anor.* [1932] S.S.L.R. 91.

(2) *Evans* v. *Bartlam* [1937] A.C. 473.

CIVIL SUIT.

Liew Shou Kong for the plaintiffs.

L. M. Ong for the defendants.

Abdul Hamid J.: This is an application by the defendants for an order to set aside judgment in default of defence entered against the defendants on 29th November 1969.

The writ of summons and the statement of claim were served on the defendants on 1st November 1969. They filed the memorandum and notice of appearance on 6th November 1969. On 5th November 1969, the defendants' solicitors applied for further and better particulars. By letter dated 24th November 1969, the plaintiffs' solicitors wrote to the defendants' solicitors drawing their attention to rule 7B of Order 19 of the Rules of the Supreme Court, stating that the request for particulars at that stage was premature. They also warned that they were proceeding to enter judgment in default of defence at the expiry of the time for defence.

The defendants' solicitors by letter dated 25th November 1969 informed the plaintiffs' solicitors that they would file an application in court for an order for further and better particulars. An application was forwarded to the senior assistant registrar, Kuala Lumpur on 2nd December 1969. The senior assistant registrar informed the defendants' solicitors that judg-